

The Changing

Landscape

for

Expectation turns to the Supreme Court as it once more takes up a free speech dispute about billboard regulation. On June 28, 2021, the Court granted the City of Austin's Petition for Writ of Certiorari in *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020), in which the Fifth Circuit struck down the city's ban on digitizing off-premises signs. Billboards have a long history of legal contention, and billboard intolerance is historic. Billboards have their place, but they can overpower the aesthetic environment and threaten traffic safety. Before they were regulated at the beginning of the 20th century, billboards overwhelmed rural and urban areas with massive structures that dominated the landscape. Concern about safety issues and an influential aesthetic movement led to stricter controls. They included sign ordinances

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that prohibited billboards, which courts upheld in early cases. Digital billboards with moving, lighted displays create new problems. They differ from traditional billboards, which have static displays that can be changed manually but do not move.

Local governments regulate signs, and sign ordinances decide what, when, and how signage speech may occur. Free speech doctrine intervenes and mediates government interests in billboard regulation, which creates two important free speech issues. Billboard speech is usually commercial speech, which has received less protection under the free speech clause. Sign ordinances also make distinctions between billboards, regulated as off-premise signs, and business signs, regulated as on-premise signs, which can create free speech problems.

This article summarizes the current application of constitutional free speech doctrine to billboard regulation. For a more extensive analysis of this topic by the author, see the author's recent article published in the Real Property, Trust & Estate Law Journal.

Daniel R. Mandelker, *Billboards, Signs, Free Speech, and the First Amendment*, 55 Real Prop., Tr. & Estate L.J. 367 (2020)

Commercial Speech, Central Hudson, and Metromedia

The leading case on commercial speech, *Central Hudson Gas & Electric Corporation v. Public Service Commission*, 447 U.S. 557, 566 (1980), adopted four criteria to decide whether a restriction on commercial speech is constitutional:

For commercial speech to come within [the First Amendment], [1] it at least must concern lawful activity and not be misleading. [2] Next, we ask whether the asserted governmental interest is substantial. If both inquiries yield positive answers, [3] we must determine whether the regulation directly advances the governmental interest asserted, and [4] whether it is not more extensive than is necessary to serve that interest. [Bracketed numbers supplied]



Billboard Regulation

By Daniel R. Mandelker

Central Hudson raised several questions. The first criterion usually is not important in sign regulation, and the Court did not clearly explain what the other criteria mean. It held the fourth criterion means that a law must be “a more limited restriction on commercial speech” and must be “narrowly drawn.” This is a “narrow tailoring” requirement typically applied as part of strict scrutiny judicial review. The Court later said the criteria are not “entirely discrete,” and referred to the second criterion as the “penultimate prong.”

Neither did *Central Hudson* indicate the judicial review standard that applies to ordinances that regulate commercial speech, which can decide when a sign ordinance is unconstitutional. The Court later said it intended intermediate scrutiny judicial review, a midlevel standard as compared with the three levels of judicial review commonly applied in equal protection cases. This standard suggests more judicial intervention than is possible under the usual rational relationship standard applied to social and economic regulation.

Content neutrality is another major issue in billboard regulation, and can be troublesome. Sign ordinances that regulate the content of a sign are content-based, presumptively unconstitutional, and subject to strict judicial scrutiny. *Central Hudson* addressed content neutrality, and held laws regulating commercial speech, such as sign ordinances, did not have to be content-neutral. It defended this conclusion in a footnote, claiming commercial speakers are well situated to evaluate their messages, and that commercial speech is a “hardy breed of expression” not susceptible to being crushed. This conclusion is now suspect.

In *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981), a plurality of the Court applied the *Central Hudson* criteria to uphold a prohibition on commercial billboards in a sign ordinance. There were five opinions. Justice White’s opinion for the plurality was joined by three justices, and all federal circuits except one have accepted it as controlling. It has dominated judicial review of laws that regulate commercial speech.

Justice White swept away any problems the *Central Hudson* criteria might have presented by holding the billboard prohibition constitutional as a matter of law. As he explained in his opening statement, billboards present special problems, and “[e]ach method of communicating ideas is ‘a law unto itself,’ and that law must reflect the ‘differing natures, values, abuses, and dangers’ of each method. We deal here with the law of billboards.”

He found “little controversy” with the first, second, and fourth *Central Hudson* criteria. It was “far too late” to contend that traffic safety and aesthetics were not substantial governmental goals, a more generous view than some states have accepted, and a majority of the justices in *Metromedia* accepted this conclusion. He rejected a claim that the ordinance was broader than necessary. If billboards are a traffic hazard and unattractive, he concluded, “then obviously the most direct and perhaps the only effective approach to solving the problems they create is to exclude them.”

Tolerance also is clear in Justice



Commercial messages connected with a site were no more valuable than noncommercial messages, and noncommercial messages located where commercial messages are allowed were not more threatening to traffic safety and the beauty of the city.

White's treatment of the fourth *Central Hudson* criterion. He disposed of it quickly, holding that if the city has a "sufficient basis" for believing that billboards are traffic hazards and unattractive, "then obviously the most direct and perhaps the only effective approach" is to exclude them.

The third "directly advance" *Central Hudson* criterion presented "the more serious question," but Justice White had little difficulty finding compliance as a matter of law. For traffic safety, he said, "[w]e likewise hesitate to disagree with the accumulated, common-sense judgments of local lawmakers and of the many reviewing courts that billboards are real and substantial hazards to traffic safety." He reached a "similar result" with respect to the aesthetic justification: "It is not speculative to recognize that billboards by their very nature, wherever located and however constructed, can be perceived as an 'esthetic harm.'" The ordinance directly advanced the governmental interests he approved.

Provisions in the ordinance that prohibited off-premise but allowed on-premise signs raised more difficult problems. They defined off-premise

signs as signs advertising goods and services not available on the premises, and on-premise signs as signs offering goods and services available on the premises. These definitions are typical, but they endangered the ordinance because they are content-based, and because allowing on-premise while prohibiting off-premise signs arguably undercuts the aesthetic purpose of the ordinance.

Justice White's response was mixed. He held the different treatment of on-premise signs did not make the ordinance underinclusive by undermining its protection of aesthetic character. Allowing on-premise signs was justified, did not denigrate the city's interest in traffic safety and beauty, and did not defeat its own case. As a matter of law, billboards, with their "periodically changing content," presented a more acute problem than on-premise signs. The city could "reasonably conclude" that a business has a stronger interest in identifying and advertising its business than in advertising businesses elsewhere. The ordinance reflected the city's decision that its interest in on-premise advertising was stronger than its interest in traffic safety and

aesthetics.

Justice White struck down the provision that allowed on-premise signs to advertise goods and services available on the premises because it discriminated against commercial speech. Commercial messages connected with a site were no more valuable than noncommercial messages, and noncommercial messages located where commercial messages are allowed were not more threatening to traffic safety and the beauty of the city. He did not consider a possible content neutrality issue.

He also held unconstitutional a group of exceptions to the off-premise sign prohibition because they permitted only a limited number of noncommercial signs. Other noncommercial signs were prohibited. Some of the permitted signs were content-based, though some were not, but Justice White did not consider the content neutrality issue. Though not entirely favorable, *Metromedia* brought in an era in which courts generally accepted billboard regulation.

Reed and Reagan National

The legal landscape changed when

the Supreme Court held another sign ordinance unconstitutional because it contained content-based distinctions among different types of noncommercial signs. *Reed v. Town of Gilbert*, 576 U.S. 155 (2015). The ordinance exempted 23 noncommercial signs from a general permit requirement, and provided different requirements for each sign. There was no evidence that the ordinance was maliciously directed at any type of speech. Justice Thomas considered only the exemptions for ideological signs, political signs, and temporary directional signs relating to a qualifying event and held the exemptions unconstitutional as content-based.

Reed clarified the conflicting tests for deciding when an ordinance is content-based that the lower courts had adopted. It concluded that content neutrality must be determined by examining the ordinance on its face. The *Reed* ordinance was a “paradigmatic example of content-based discrimination,” and Justice Thomas held that the commonsense meaning of content-based regulation requires courts to consider whether a regulation of speech on its face draws distinctions based on the message a speaker conveys: “Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose.”

Content neutrality has always been a critical issue in defining the constitutionality of sign ordinances, but the restatement of this requirement in *Reed* gave it prominence. A critical question still remains unanswered. Justice Thomas did not indicate whether *Reed* reversed course by applying content neutrality to commercial speech, an uncertainty made more problematic by his not citing any of the Supreme Court decisions that had dealt with commercial speech. Most lower courts that have considered this question have held that *Reed* does not change the law, but the omissions in *Reed* cast doubt on the earlier Supreme Court holding that laws regulating commercial speech, such as

billboard regulations, need not be content neutral.

Problems with the different treatment of off-premise and on-premise signs and the content neutrality issue came together in a case now before the Supreme Court, *Reagan National Advertising of Austin, Inc. v. City of Austin*, 972 F.3d 696 (5th Cir. 2020). Reagan filed an application to convert existing static billboards to digital billboards, but the city denied it because the sign code prohibited digitizing off-premise signs but allowed digitizing on-premise signs. The court held this distinction content-based because an off-premise sign was defined, generally, as a sign advertising goods or services not available on the premises. This decision meant that whether an off-premise sign could be digitized depended on its content. In *Metromedia* the ordinance had a similar definition, but the Court did not consider it.

Strict scrutiny applied because the ordinance was content-based and applied equally to commercial and noncommercial speech. Laws subject to strict scrutiny must serve a compelling governmental purpose. Here, the

different treatment of off-premise and on-premise signs did not serve a compelling governmental purpose because aesthetic differences between off- and on-premise signs did not justify stricter limits for off-premise signs. Strict scrutiny accomplished what intermediate scrutiny in *Metromedia* could not do.

The content neutrality issue in *Reagan* is reflected in the question presented to the Supreme Court:

Whether the Austin city code’s distinction between on-premise signs, which may be digitized, and off-premise signs, which may not, is a facially unconstitutional content-based regulation under *Reed v. Town of Gilbert*.

Conclusion

Whether the Court will end the gentle touch of *Metromedia* by moving beyond this narrow issue to hold that laws regulating commercial speech must be content-based is not certain. Oral argument held in *Reagan National* on November 10, 2021 was not helpful, as justices traded anecdotes and were not interested in precedent. We do not know whether another chapter in the law of billboards will be written. ■



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